United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1277

To be argued by
ANDREW J. CONNICK

United States Court of Appeals
FOR THE SECOND CIRCUIT

GEORGE FELDMAN, as Trustee in Bankruptcy of Leasing Consultants Incorporated, Bankrupt,

Plaintiff-Appellee,

against

CHASE MANHATTAN BANK, N.A.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUHERN DISTRICT OF NEW YORK

REPLY BRIEF OF DEFENDANT-APPELLANT

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POINT I

Perfection of a security interest in assigned rents receivable does not require filing of the assignment with the administrator.

As security for a loan by The Chase Manhattan Bank, N.A. ("Chase") to Leasing Consultants, Inc. ("LCI") in June, 1967, which was used to satisfy a previously existing mortgage on an aircraft purchased by LCI, Chase took an assignment of, *inter alia,* the rentals generated by lease of the aircraft to Zinke-Smith, Inc., now known as Devcon International Corporation ("Devcon") (A-8 to A-9, the

"Assignment") and in addition, obtained a security interest in the leased aircraft (A-53 to A-54).

The trustee acknowledges the recording of the chattel mortgage and security agreement. However, he argues (a) that Chase lost its rights under the mortgage by an assignment to Devcon (T-20)* and (b) that Chase's failure to record the Assignment rendered it invalid against him because of § 70c of the Bankruptcy Act, 11 U.S.C. § 110(c), and entitles him to recover all rentals received by Chase under the Devcon lease subsequent to the filing by LCI, on August 18, 1970, of a Chapter XI petition. To support this argument, the trustee asserts that assignment of a lessor's interest under an aircraft lease affects an interest in the aircraft and therefore constitutes a conveyance which must be recorded for it to be valid against third persons without actual notice.

Although a superficial reading of the provisions of the Federal Aviation Act of 1958, 49 U.S.C. § 1301, *et seq.* (the "Act") and applicable regulations upon which the trustee bases his argument may seem to lend it some support, a closer analysis, with a view toward the intent and purpose of the Act, leads to the contrary conclusion. The major flaw in the argument is that the assignment of a lessor's interest in a lease does not convey an interest affecting title to or any interest in aircraft.

The relevant portion of § 503 of the Act, 49 U.S.C. § 1403 entitled "Recordation of aircraft ownership—Establishment of recording system", provides:

> "(a) The Administrator shall establish and maintain a system for the recording of each and all of the following: (1) Any conveyance which affects the title to, or any interest in, any civil aircraft of the United States; . . . (c) No conveyance or instrument the recording of which is provided for by subsection (a) of this section shall be valid in respect of such air-

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* References herein to the brief of plaintiff-appellee are designated by page parenthetically as indicated.

> craft, . . . against any person other than the person by whom the conveyance or other instrument is made or given, his heir or devisee, or any person having actual notice thereof, until such conveyance or other instrument is filed for recordation in the office of the Administrator . . . (g) The Administrator is authorized to provide by regulation for . . . the recording of . . . transactions affecting title to or interest in aircraft, . . . and for such other records, proceedings, and details as may be necessary to facilitate the determination of the rights of parties dealing with civil aircraft of the United States, . . ."

The meaning of the term "conveyance" as used in the statute is defined in § 101 (17) of the Act, 49 U.S.C. § 1301:

> "(17) 'Conveyance' means a bill of sale, contract of conditional sale, mortgage, assignment of mortgage, or other instrument affecting title to, or interest in, property."

14 C.F.R. § 49.31 referring to "Subpart C—Aircraft Ownership and Encumbrances Against Aircraft", which subpart details requirements pertaining to conveyances which must be complied with in order for such a conveyance to be eligible for recording, and allows for notation on the FAA record of certain salvage and preservation expense claims against aircraft, specifies that:

> "This subpart applies to the recording of the following kinds of conveyances: (a) A bill of sale, contract of conditional sale, assignment of an interest under a contract of conditional sale, mortgage, assignment of mortgage, lease, equipment trust, notice of tax lien or of other lien, or other instrument affecting title to, or any interest in, aircraft. (b) A release, cancellation, discharge, or satisfaction of a conveyance named in paragraph (a) of this section."

Thus, neither the statutory definition of conveyance nor the regulations dealing with the eligibility of conveyances

for recording specifically refers to the assignment of an aircraft lease. But the trustee argues that the assignment of a lessor's interest under a lease, nonetheless, is a conveyance which affects an interest in the aircraft in question, pointing to the analysis offered by Judge Bauman (A-68) as the basis for his decision that 49 U.S.C. § 1403 requires the recording of the assignment in order for the assignee to perfect a security interest in the assigned rentals.

> "It would seem incontrovertible that the statutory language 'conveyance which affects . . . any interest in' an airplane should encompass an assignment of a lease. Clearly the present possessory right and the entitlement to rentals conferred by a lease agreement are property 'interests' as the term has been generally understood; less than 'title' perhaps, but 'interests' nonetheless. It then follows that assigning a lease 'affects' the lessor's interest by transferring its primary incident, the right to receive rentals."

The two-sentence analysis offered to support the initially-quoted assertion is correct, but is non-supportive because it does not deal with the matter at issue. No one questions or doubts that possessory rights in equipment and the entitlement to rentals constitute property interests or that assignment of a lease affects the lessor's interest by transferring his right to receive rentals. But the relevant issue is not whether the lessor's property interests are affected, but rather, whether the assignment of such rentals affects the title to, or any interest in aircraft, aircraft engines, propellers, appliances, or spare parts to which the recording requirements of 49 U.S.C. § 1403 are applicable; for it is only a conveyance or instrument affecting title to or interests in such aircraft or specified aircraft equipment and parts that need be recorded under the Act. 49 U.S.C. § 1403(c). See 14 C.F.R. § 49.1. Indeed, conveyances are not eligible for recording unless they do affect such aircraft or aircraft engines, propellers, appliances or spare

parts. 14 C.F.R. §§ 49.33(d), 49.43(a), 49.53(a)(1)[1] It is precisely because the assignment of rentals alone would have afforded no tangible protection to Chase in the event Devcon defaulted on the lease and LCI defaulted on its indebtedness to Chase (because in those circumstances, Chase would have been in a wholly unsecured position) that Chase insisted as a condition of the loan, that it obtain a security interest in the aircraft leased to Devcon as well.

In point of fact, Chase's assignment form (A-8 to A-9) did grant to Chase more than a right to rentals,[2] and had Chase chosen to rely on its security interest in the aircraft as set forth in the lease and Assignment, it could have recorded them with the FAA instead of the chattel mortgage and security agreement (A-53 to A-54). But the failure to record the Assignment does not render such Assignment totally void.[3] Nor is it partially void either in respect of the security interests in the aircraft or rents receivable thereby transferred to Chase; but rather, 49 U.S.C. § 1403(c) specifies that the assignment is not valid in respect of any interest in the aircraft thereby conveyed as against ". . . any person other than the person by whom the conveyance or other instrument is made or given, his heir or devisee, or any person having actual

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[1] Although, the fact of the recording of a conveyance is not a decision of the FAA that the instrument does, in fact, affect title to, or an interest in, the aircraft or other property it covers. 14 C.F.R. § 49.17(c).

[2] In the first paragraph of the Assignment, the rentals were assigned to Chase ". . . together with all other rights, powers and remedies of the undersigned under said lease agreement, and together with all the right, title and interest of the undersigned in and to the property therein described as security for the payment of said rentals . . ." which rights included, by virtue of paragraph 17(b) of the lease (A-4), the right to take possession of and sell the underlying aircraft.

[3] The validity of any instrument eligible for recording is governed by the law of the State, possession, Puerto Rico, or District of Columbia, as the case may be, in which the instrument was delivered. 14 C.F.R. § 49.17(c).

notice thereof, until such conveyance or other instrument is filed for recordation in the office of the Administrator. . . ." Accepting for the moment the trustee's assertion that Chase no longer has any rights under the chattel mortgage and security agreement[4] and that he acquires under § 70c of the Bankruptcy Act, the status of a person without actual notice of the assignment,[5] the fact that 49 U.S.C. § 1403(c) prevents Chase from asserting against the trustee the security interest in the aircraft granted to Chase by such Assignment and chattel mortgage and security agreement, should not work as forfeiture of Chase's right, duly perfected under the New York Uniform Commercial Code (the "Code"), to the assigned rentals alone; particularly where property interests in such rentals were not required to be filed or recorded under the Act, and indeed could not properly have been recorded under the Act absent the accompanying reference to property interests in the aircraft. 14 C.F.R. § 49.33(d). Chase should not be penalized so that it is in a worse position for having attempted to obtain rights in the aircraft by virtue of the Assignment than if it had never made such an attempt. In short, if the rights in the aircraft transferred to Chase by the Assignment cannot be asserted, then Chase's rights should be considered as if such rights had not been included in the assignment (which clearly is the intent of the circuitous wording of 49 U.S.C. § 1403(c)) i.e., the rights granted by such Assignment would be defeasible by the trustee only in respect of recordable property interests. So considered, it is apparent that Chase obtained a validly perfected assignment of and security interest in, and therefore a right to receive and retain, all of the Devcon rentals.

That a secured party may fail with respect to one aspect of its collateral without affecting another was recognized by this Circuit in *In re Leasing Consultants, Incorporated,*

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[4] See point III *infra.*

[5] See discussion of trustee's standing to sue (pp. 19-20) and Judge Weinstein's finding that trustee in that case had notice (p. 25).

486 F.2d 367 (2d Cir. 1973). In fact, the distinction between monetary obligations of the lessee and interests in the underlying equipment, even though such interests are transferred by a single instrument, was the entire predicate of this Circuit's opinion in *Leasing Consultants, supra.* This Court there stated that the assignment of the lease therein involved operated both as an assignment of an interest in the tangible property and as an assignment of the "receivable", that is, the right to receive the rents. This Court held that the assignment of the interest in the tangible property was subject to the appropriate filing rules for equipment (under the Uniform Commercial Code in that case, or in this case under the Act if and to the extent any interest in such property was deemed to be taken under the form of Assignment). But the right to the receivables was considered a different matter and one subject to the rules relating to perfection of an interest in the chattel paper as such under the Code. Here, the interest in the chattel paper as such was perfected by Chase by taking possession thereof. Code § 9-305.

Moreover, the principal of *Leasing Consultants, supra,* which applies with equal force here, is expressed in the very section of the Bankruptcy Act upon which the trustee relies,[6] which provides, *inter alia*:

> "If a transfer is valid in part against creditors whose rights and powers are conferred upon the trustee under this subdivision, it shall be valid to a like extent against the trustee."

The background and explanation of this aspect of § 70c, added by the 1966 amendment thereof in 80 Stat. 268 (effective July 5, 1966),[7] is set forth in House Report No. 686, 89th Cong., 1st Sess. (1965),[8] 4A *Collier on Bankruptcy*

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[6] Bankruptcy Act § 70c, 11 U.S.C. 110(c). (T-2).

[7] P.L. 89-495, § 5; U.S. Code Cong. and Admin. News (1966) 303, 305-306.

[8] *Accord,* S.Rep. No. 1159, 89th Cong. 2nd Sess. (1966) in U.S. Code Cong. and Admin. News (1966) 2456, 2466-2467.

¶ 70.47, at 580 (14th ed. 1971):

> "If a security transaction or other transfer involving a debtor's property is valid in part against creditors whose rights and powers are conferred upon the trustee by the proposed amendment, it seems clear that it should be valid to the same extent against the trustee. While nothing in the proposed or existing legislation empowers the trustee to invade interests that no creditor described in the new version of the 'strong-arm' clause could have reached, it has been thought advisable not to leave this limitation in the realm of inference. Thus, a security transaction involving property located in more than one county or State may be perfected against creditors having the rights conferred upon the trustee by the proposed subdivision, only in respect to the property located in one of the jurisdictions. The security transfer would remain valid against the trustee under the proposed section 70c insofar as property in the one jurisdiction is covered. *In like manner, a security transaction duly perfected as to one kind of property but not as to another,* or valid to the extent of only a part of the consideration given, *would remain valid pro tanto against the trustee* so far as this subdivision would apply." (Italics supplied.)

The considerations compelling the adoption f this amendment are directly applicable to this case. Here, at best, the trustee can set aside Chase's security interest in the aircraft, but he can not do more. He may not take advantage of the Assignment's invalidity in respect of certain rights conveyed thereby to defeat the otherwise valid and duly perfected assignment of Devcon rentals. The rental aspect of the Assignment, and the right to lessee's payments created thereby should be considered separate and apart from the security interests of repossession and sale it transferred in the aircraft. Viewed thusly, it is clear that Chase's right to retain those rentals is not defeasible by the trustee.

New York Real Property Law ("RPL") § 290, *et seq.*, provides a fitting analogy to the construction of Act urged here. As indicated previously, the term "conveyance" as used in the Act is defined at 49 U.S.C. § 1301 (17) to mean a "bill of sale, contract of conditional sale, mortgage, assignment of mortgage, or other instrument affecting title to, or interest in, property." Clearly, as employed in 49 U.S.C. § 1403(a), the general term "property" in the definition of conveyance becomes a specific reference to the aircraft, aircraft engines, propellers, appliances, and spare parts to which the recording requirements of § 1403 are applicable.[9] RPL § 291 provides that every conveyance of real property is invalid as against certain third parties unless it has been duly recorded. The term "conveyance" is defined in RPL § 290(3) to include "*every written instrument, by which any estate or interest in real property is created,* transferred, mortgaged *or assigned,* or by which the title to any real property may be affected . . ." (Italics added). Despite the broad language set forth in RPL § 290 and its predecessor statutes,[10] the courts of this State have uniformly held that an assignment of rents accruing under a lease of real property is not a conveyance of an "interest" in real property within the meaning of the recording statute. *See e.g., Harris* v. *Taylor,* 35 App. Div. 462, 54 N.Y.S. 864, 867 (1st Dep't 1898), *appeal dismissed,* 159 N.Y. 533, 53 N.E. 1126 (1899); *Conley* v. *Fine,* 181 App. Div. 675, 169 N.Y.S. 162, 164 (1st Dep't 1918); *Monica Realty Corp.* v. *One Twenty-Two Fifth Avenue Corp.,* 264 N.Y. 52, 189 N.E. 778 (1934); *accord, Rolandelli* v. *Stanton,* 129 Misc. 270, 220 N.Y.S. 502 (N.Y. Mun. Ct. 1927). State and Federal courts in other jurisdictions have recently rendered similar judg-

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[9] *See, e.g.,* 49 U.S.C. § 1403(c); 14 C.F.R. § 49.1.

[10] Section 240 of the Real Property Law, the predecessor of RPL § 290, contained the same broad definition of "conveyance" and provided further that: "The terms 'estate' and 'interest' in real property include every such estate and interest freehold or chattel, legal or equitable, present or future, vested or contingent".

ments. *See, e.g., Texas and New Orleans Railroad Co.* v. *Phillips,* 211 F.2d 419 (5th Cir. 1954), *cert. denied,* 348 U.S. 913, 75 S. Ct. 293 (1955), cited CCH Bankr. L. Rep. ¶ 4527.0511; *Anderson* v. *Island Creek Coal Co.,* 297 F. Supp. 283 (W.D. Ky. 1969); *In re Bristol Associates, Inc.,* Index No. 72-276 (E.D.Pa. December 20, 1973), opinion summarized CCH Bankr. L. Rep ¶ 65,209. Moreover, both *Harris* and *Conley* have been consistently cited with approval. See, e.g., *Witschger* v. *J.K. Marvin & Co.,* 255 App. Div. 70, 5 N.Y.S.2d 910 (2d Dep't 1938); *Rockmore* v. *Lehman,* 129 F.2d 892 (2d Cir. 1942); *Empire State Collateral Co.* v. *Bay Realty Corp.,* 232 F.Supp. 330 (E.D.N.Y. 1964); *New York Life Insurance Co.* v. *Fulton Development Corp.,* 265 N.Y. 348, 193 N.E. 169 (1934); *Sullivan* v. *Rosson,* 223 N.Y. 217, 119 N.E. 405 (1918). These authorities suggest that the specific omission of such assignments from the FAA recording regulations was not only purposeful, but in complete accord with analogous case law. And even more significantly, the distinction between an assignment of rents due under a lease of real property and the "conveyance of an interest" in real property, as set forth in the foregoing cases, has been retained and codified by the New York State Legislature. *Compare* RPL § 290(3) *with* RPL § 294-a *and* RPL § 294(3). In short, despite the fact that such assignments must now be recorded, the Legislature properly recognized that an assignment of rent does not constitute an "interest" in the leased property, and therefore, should not be encompassed, in the operative definition of "conveyance" set forth in RPL § 290(3).

Just as RPL § 294-a provides for the recording of assignments of rent even though such assignments do not constitute conveyances of interests in real property, 49 U.S.C. § 1403(g) authorizes the Administrator to provide by regulation not only for "transactions affecting title to or interest in aircraft, aircraft engines, propellers, appliances, or parts," but additionally for "such other records, proceedings, and details as may be necessary to facilitate

the determination of the rights of parties dealing with civil aircraft of the United States, aircraft engines, propellers, appliances, or parts." The fact that no regulation has yet been promulgated under the Act requiring or providing for the filing or recording of an assignment of a lessor's interest in aircraft rental payments is highlighted by the fact that 14 C.F.R. §§ 49.41 (b) and 49.51(b) respectively, call for the recording of assignment of leases of "any specifically identified aircraft engine of 750 or more rated takeoff horsepower, or the equivalent of that horsepower, or a specifically identified aircraft propeller capable of absorbing 750 or more rated takeoff shaft horsepower" and "any aircraft engine, propeller, or appliance maintained by or on behalf of an air carrier certificated under section 604(b) of the Federal Aviation Act of 1958 (49 U.S.C. 1424(b)) for installation or use in aircraft, aircraft engines, or propellers, or any spare parts, maintained at a designated location or locations by or on behalf of such an air carrier," where, in each instance, the lease assignment affects the particular property described. This Court need not grapple with the issue of whether the lease involved in this case was executed for security purposes,[11] for there is no provision in the regulations which applies to, or provides for, the recording of assignments of rents receivable under leases of complete aircraft, whether or not such lease was executed for security purposes. Under these circumstances, the conclusion is inescapable that the omission of an assignment of an aircraft lease from both the statutory and regulatory definitions and provisions was a deliberate and intentional one. If this Court finds that an assignment of a lessor's interest in rentals is not an interest in aircraft, the fact that the Administrator has not required recording of such assignments as "other records, proceedings, and details as may be necessary to facilitate the determination of the rights of parties deal-

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[11] This issue, although posed by the trustee (T-13) is not relevant to the lease in question here.

ing with civil aircraft of the United States . . ." renders the trustee's claim to post-petition proceeds of the Devcon lease without merit.[12]

That the omission of aircraft lease assignments from the Act and regulations was deliberate, is confirmed when the nature and purpose of the recording provisions are considered. The trustee argues that "in terms of the development of the chattel paper concept under the Code, there is no reasonable basis to distinguish between the clearly mandated recording of assignments of aircraft mortgages and assignments of aircraft conditional sale contracts on the one hand and the assignment of an aircraft leases." (T-12). In terms of the development of the Code the trustee is correct, but he is concerning himself with the wrong statute. The purposes of the Code and the Act are manifestly different. The recording provisions of the Code were not enacted solely to provide for central recording of security interests in specific types of equipment,[13] nor is the purpose of § 503 of the Act "to provide a simple and unified structure within which the immense variety of present-day secured financing transactions can go forward with less cost and with greater certainty."[14] Once this distinction is recognized, the basis for the variation in recording requirements between the Code and the Act becomes clear. The trustee helpfully points out that:

> "Congress clearly intended that all instruments affecting title to or interests in aircraft be recorded so that anyone dealing with an aircraft can rely on

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[12] This court need not decide now the consequence of failure to record instruments which may be required by regulations to be recorded, which instruments do not affect interests in properties described in 14 C.F.R. § 49.1(a). Compare 49 U.S.C. § 1403(c) with 14 C.F.R. § 49.17(c).

[13] *See, e.g.*, House Report No. 445, 86th Cong., 1st Sess. (1959), in U.S. Code Cong. and Admin. News (1959) 1762-1765.

[14] *Leasing Consultants, supra,* 486 F. 2d at 370; *accord,* Code § 9-101, Official Comment 7th ¶.

> the record to reveal all enforceable encumbrances on the aircraft and the holders of such encumbrances." (T-12)

Mortgages, conditional sales and assignments thereof must be recorded under the Act because a mortgagee, conditional seller or assignee thereof obtains a lien or security interest in the aircraft, while a mortgagor, conditional buyer or "assignee" thereof obtains at least a possessory interest in the aircraft. Leases must be recorded under the Act because the lessor has title and a reversionary interest in the aircraft while the lessee has a possessory interest therein. An "assignment" of the lessee's interest (really a "re-lease" or "sub-lease") insofar as it conveyed a possessory interest in the aircraft would be recorded under the definition of lease, while assignment of the lessor's ownership interest in the aircraft would be recorded as a bill of sale. But an assignment of the lessor's right to rents receivable is only a monetary transaction not affecting the aircraft, no different from assignment of any of the lessor's other accounts receivable. Clearly, under the Code, provision is made for perfection of such interests, i.e., by permissive filing or possession of the lease,[15] because the purpose of the Code is to establish a comprehensive uniform scheme for the regulation of security interests in personal property and fixtures and for procuring credit information concerning the status of debtors.[16] But there is nothing in the purpose or structure of the Act or its predecessors, the Civil Aeronautics Act of 1938 and the Ship Mortgage Act of 1920, which concerns in general the status of property interests of debt-

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[15] Code §§ 9-304(1) and 9-305; *see McKinney's* Code § 9-102, Practice Commentary, ¶ 4. Alternative methods of perfection are offered to correspond with commercial practice, i.e., chattel paper is sometimes delivered to the assignee, and sometime left in the hands of the assignor for collection. Code § 9-304(1) allows the assignee to perfect his interest by filing in the latter case. Code § 9-304(1), Official Comment, ¶ 1.

[16] Code § 9-102; Code § 9-101, Official Comment 1st, 3rd and 13th ¶s.

ors,[17] and Chase had no obligation to protect Devcon's possessory interest in the aircraft by recording the lease. Judge Bauman misconceived the intent of the statute and the scope of Chase's obligations under it when he wrote:

> "Here, Chase filed only the chattel mortgage and not the lease or its assignment. This meagre filing does not give notice that the airplane was leased—a conveyance for which filing is specifically required by 14 C.F.R. § 49.31(a)—or that the lease payments were to be made to Chase and not to LCI. A potential creditor of LCI, or even a subsequent purchaser of the airplane, consulting the FAA files, might be misled into the wholly justifiable conclusion that LCI owned a valuable possessory interest in an airplane and, a fortiori, was entitled to the rental payments (which may well have exceeded the payments due under the mortgage) should such possessory interest be leased out. The perfection of security interests under Section 1403 is not too burdensome to expect of anyone seeking its protection." (A-68 to A-69)

Only LCI and Devcon would have had an interest in filing the lease; LCI, to protect its reversionary interest in the aircraft if such interest were not adequately safeguarded by the bill of sale; and Devcon, to protect its possessory interest against the possibility of subsequent lease or sale of the aircraft by LCI to persons without actual notice of the lease. And although the Act is concerned with recording of "conveyances" of aircraft, engines, etc. (49 U.S.C. § 1403(a)(1), (2) and (3) and § 1403(c)), it is not concerned with control or recording of monetary obligations such as receivables which arise out of transactions in aircraft. Therefore, insofar as the Federal Aviation Act requires recording of assignments of conditional sales contracts (49 U.S.C. § 1301(17) and 14 C.F.R. § 49.31(a)), it is concerned only with recording of that aspect of the

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[17] *See* 1 Gilmore, *Security Interests in Personal Property*, §§ 13.2 and 13.5 (1965).

assignment which deals with the aircraft property interest, and it does not attempt to deal with that aspect of the assignment that is concerned with the transfer of the debt, which explains the conspicuous absence in the statute and regulations of the requirement of recording the assignment of a lessor's interest in an aircraft lease (14 C.F.R. §§ 49.17(d)(2) and 49.17(e)(3)) or other lease not intended as security (14 C.F.R. §§ 49.41(b) and 49.51(b)). In fact, as previously indicated, the assignment of a lessor's interest in aircraft rentals, standing alone, is not eligible for recording under the regulations. 14 C.F.R. § 49.33(d); see 14 C.F.R. §§ 49.43(a) and 49.53(a)(1).

The trustee states he believes that the chattel paper is in fact a conditional sales contract, and that if the court determines that the assignment of a lessor's interest under an aircraft lease is not a recordable conveyance, but that the assignment of a vendor's interest under a contract of conditional sale is a recordable conveyance, the cause must be remanded for trial (T-9).

A conditional sales contract is specifically defined in 49 U.S.C. § 1301 (16) as follows:

> "... any contract for the ... leasing of an aircraft ... by which the ... lessee contracts to pay as compensation a sum substantially equivalent to the value thereof, and by which it is agreed that the ... lessee ... has the option of becoming, the owner thereof upon full compliance with the terms of the contract." Act § 101(16)(b), 49 U.S.C. § 1301(16)(b).

This definition of conditional sale contract makes clear that a document in the form of a lease is deemed a conditional sale contract only if the lease rentals constitute compensation substantially equivalent to the value of the aircraft, and if the lease is accompanied by an option. No matter how clear it might be that the lease rentals constitute compensation substantially equivalent to the value of the aircraft, the lease is not a conditional sale contract

unless it is agreed that the lessee has the option to become the owner of the aircraft upon full compliance with the terms of the contract. 49 U.S.C. § 1301 (16). Therefore, the lease without the option is not a conditional sale contract, which characterization precisely describes the situation at bar (A-59, ¶¶ 4 & 5; A-62 & A-63). The terms of the lease are explicit (A-4):

> "14. This is an agreement of lease only, and nothing herein shall be construed as conveying to Lessee any right title or interest in or to the Equipment leased hereunder except as a lessee only. Title to the Equipment shall at all times remain in Lessor. Lessee shall at all times protect and defend, at its own cost and expense, the title of Lessor from and against all claims, liens and legal processes of creditors of Lessee and shall keep all of the Equipment free and clear of such claims, liens and processes."

and the trustee advances no evidence of the existence of a purchase option, which is not unusual in view of the fact that no such option was ever executed (A-26, ¶ 7) and the only evidence of such an option consists of the allegations of the lessee that one was intended to be executed[18] and the correspondence of the trustee refusing to acknowledge the non-existent option (A-63). One need not be a psychologist to ascertain the cause of the trustee's change of perspective, but more is required for remand than the frivolous suggestion that there may have been a purchase option. *See, Ex parte Poresky,* 290 U.S. 30, 78 L. ed. 152, 54 Sup. Ct. 3 (1933); *Kirkland* v. *Wallace,* 403 F.2d 413 (5th Cir. 1968). Moreover, it is well settled that where a trial judge does not discuss a particular question of fact or make any finding bearing thereon, but a) all the evidence with respect thereto is documentary so that the appellate court can pass upon the facts as well as the trial court, or b) the facts relied upon to support determination of the question

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[18] If an option was intended by the lessor and the lessee was anxious to obtain the option, why wasn't such option executed when it was allegedly mailed to the lessee?

not previously considered below are in the record and not in dispute, or c) the record as a whole presents no genuine issue as to any material fact, the questions for decision are questions of law and the case should not be remanded for findings of fact or conclusions of law, but rather the court of appeals should determine the matter on its merits. *King* v. *C.I.R.*, 458 F.2d 245 (6th Cir. 1972); *McComb* v. *Utica Knitting Co.*, 164 F.2d 670 (2d Cir. 1947); *Aetna Life Ins. Co.* v. *Meyn*, 134 F.2d 246 (8th Cir. 1943); *Texas Co.* v. *R. O'Brien & Co.*, 242 F.2d 526 (1st Cir. 1957); *Sbicca-Del Mac, Inc.* v. *Milius Shoe Co.*, 145 F.2d 389 (8th Cir. 1944).

Even apart from the fact that there was no purchase option and consequently no conditional sale contract, there is no question but that the lease together with the option, i.e., a conditional sales contract, is a conveyance required to be recorded. 49 U.S.C. § 1301(17) and the regulations issued pursuant to the Act specifically include a contract of conditional sale in the definition of the conveyances required to be recorded under the Act. 14 C.F.R. § 49.31 (a). It is equally clear that under 49 U.S.C. § 1403 (c) of the Act, the failure to record a conditional sales contract invalidates it as to all without actual notice. While the trustee is quick to seek to invalidate the assignment for lack of recording as allegedly required by 49 U.S.C. § 1403 (c), he seeks to ignore the requirement of the same Section of recording of the option. In substance, it is Chase's position that the transaction is not a conditional sale as to it because the option was never recorded and it had no actual notice thereof. Under the Act the option is an essential element to convert a lease into a conditional sales contract. Accordingly, Chase contends that the non-existent option, even if both parties intended to create it, is invalid under the terms of the very same statute by which the trustee claims the assignment of rentals is invalid. Thus, the very bedrock of the trustee's assertion that the cause must be remanded for trial is fundamentally flawed. Since the transaction could be a conditional sale only because of the option and since the option was not recorded, it is clear that the transaction was not a conditional sale as to Chase.

Even if there was an option (which there was not, A-34, ¶ 8) and even if Chase may be charged with notice of it (and because Chase did not have access to the books and records of LCI, its only notice or knowledge of such an option necessarily would be through the trustee who disclaimed any such knowledge or notice, A-63) it is not at all clear why Chase would have an obligation to file its assignment in order to protect its rights under such a hypothetical conditional sale contract. The assignment of rents should be given effect as an assignment of the monetary aspect of the conditional sale contract. Since this has nothing to do with aircraft, it was properly perfected under the Code by taking possession of the lease. Code § 9-305. As has been demonstrated, there is not the slightest justification for arguing that the Act requires recording of aircraft obligations with the FAA. Accordingly, even if the transaction were a conditional sale, the fact that Chase cannot assert any rights in the aircraft (49 U.S.C. § 1403(c)) does not alter the circumstance that it properly perfected its interest in the rentals by possession of the lease.

POINT II

Because the federal statute does not govern perfection of an assignee's interest in lease rentals, such assignment may be perfected by compliance with the Code.

The trustee attempts to divert attention from Chase's due perfection of its right to Devcon's rentals by reliance on the supremacy of the Act over the provisions of the Code. But this is the source of the inquiry, not its conclusion. Chase concedes that to the extent the Federal statute provides for or regulates the perfection of the interests at issue here, the Act would supersede provisions of the Code otherwise applicable, by virtue, among other things, of provisions in the Code itself. Code §§ 9-104(a) and 9-302(4). However, as indicated by the preceding discussion, the Act does not provide for or regulate the perfection by an assignee of its interest in assigned aircraft

lease rentals, in contrast to assignments of security interests in the aircraft. The interposition of the recording provisions of the Act upon the provisions of the Code relating to perfection of security interests in personal property and fixtures, begins and ends with filing and recording of security interests and other liens and encumbrances affecting title to, or any interest in the aircraft, engines, propellers, appliances and parts described in 49 U.S.C. § 1403(a) and 14 C.F.R. § 49.1.

Where, as in this case, the governing statute and regulations are explicit, there is no rational basis for judicial interpolation beyond the intended scope of the purposes and provisions of the legislation to the detriment of parties who complied with its express terms.

While the trustee advocates interpretive expansion of 49 U.S.C. § 1403(c) to entrap those without notice of the breadth of its requirements, so broadened,[19] he makes no showing that he comes within the protection of its express terms. Section 70c of the Bankruptcy Act formulates three different powers of the trustee, all of which grant to the trustee the rights of a hypothetical judgment creditor who obtains a lien on personal property by levy on the date of bankruptcy. 11 U.S.C. 110(c). Thus, the ability of the trustee to attack the Assignment under Section 70c depends on the ability of a judgment creditor to do so. In cases considering the relative rights of attaching creditors against those of unrecorded purchasers or secured parties, the courts have upheld the rights of the unrecorded parties on the ground that the attaching creditor had not acted in reliance on the record. *Marshall* v. *Bardin*, 169 Kan. 534, 220 P.2d 187 (1950); *Curtis* v. *Carey*, 393 S.W.2d 185 (Tex. Civ. App. 1965); *Smith* v. *Joliet Airmotive, Inc.*, 35 Ill. App.2d 2, 181 N.E.2d 817 (Ill. App. Ct. 1962); *see also, Aero Corp* v. *Associated*

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[19] Creation of such *ex post facto* requirements of which the statute gave no notice raises constitutional issues of due process. *See generally, Anderson Nat. Bank* v. *Luckett*, 321 U.S. 233, 88 L.ed. 692, 64 Sup.Ct. 599 (1944); *Voeller* v. *Neilston Warehouse Co.*, 311 U.S. 531, 85 L.ed. 322, 61 Sup. Ct. 376 (1941).

Aerial Survey Co., 184 F.Supp. 821 (D.Md. 1960); *Marrs* v. *Barbeau*, 336 Mass. 416, 146 N.E.2d 353 (1957). But whether the Act protects those who have dealt on the basis of recorded title and interests, or extends to the trustee, Chase perfected its interests in the assigned rentals by compliance with the Code. The confusion resulting from any other determination on these facts would spawn the specter of state and federal double filing requirements, leading away from the uniformity that the Code sought to establish in commercial transactions.

Personal property security legislation is primarily a state rather than a federal concern, and courts have uniformly declined to extend application of the Act beyond its terms where such state interests predominate. *See, e.g., Industrial Nat'l Bank of R.I.* v. *Butler Aviation Int'l, Inc.*, 370 F.Supp. 1012 (E.D.N.Y. 1974); *State Securities Co.* v. *Aviation Enterprises, Inc.*, 355 F.2d 225 (10th Cir. 1966); *Northern Illinois Corp.* v. *Bishop Distributing Co.*, 284 F.Supp. 121 (W.D.Mich. 1968); *Texas National Bank of Houston* v. *Aufderheide*, 235 F.Supp. 599 (E.D. Ark. 1964); *Aircraft Investment Corp.* v. *Pezzani & Reid Equipment Co.*, 205 F.Supp. 80 (E.D.Mich. 1962). *But cf., Dowell* v. *Beech Acceptance Corporation, Inc.*, 3 Cal.3d 544, 476 P.2d 401 (1970), *cert. denied*, 404 U.S. 823 (1971). As noted in 1 Gilmore, *Security Interests In Personal Property*, § 13.5 (1965) at pp. 426-427:

> "Except for the engine and spare parts liens, § 503 is not in any sense a substantive statute. Therefore, it is believed, apart from these substantive provisions, the question of formal requisites, and the operation of the recording system, state law should apply to determine any question arising in connection with a security interest in aircraft. The argument for a federal law solution is even weaker here than under any of the federal statutes we have so far discussed: § 503 is much less comprehensive than the Ship Mortgage Act and there is not the same federal source of power that could be alleged in favor of a federal

> solution in the fields of copyright, patent and admiralty law. The cases decided under § 503 all seem to assume that state law is generally applicable and that § 503 is clearly an 'interstitial' statute, which goes as far as it goes but no further."

See also Birmingham, "Security Interests in Aircraft" 10 B.C. IND. & COM.L.REV., 973, 974 (1969), and Sigman, "The Wild Blue Yonder: Interests in Aircraft under our Federal System" 46 S.CAL.L.REV., 337, 377 (1973). Additionally, Official Comment 1 to Code § 9-104(a), further explains:

> "The present provisions of the Civil Aeronautics Act (49 U.S.C.A. § 523) call for registration of title to and liens upon aircraft with the Civil Aeronautics Administrator and such registration is recognized as equivalent to filing under this Article (Section 9—302(3)); but to the extent that the Civil Aeronautics Act does not regulate the rights of parties to and third parties affected by such transactions, security interests in aircraft remain subject to this Article, pending passage of federal legislation."

Because an assignment of rents receivable is not a subject of the Act, and because such interests are not referred to in the regulations even though the Administrator is empowered to provide for transactions not affecting title to or interests in aircraft, Chase perfected its interest in such rentals pursuant to the Code.

POINT III

The trustee should be estopped from questioning perfection of Chase's security interest in the assigned rentals.

The trustee asserts there is no estoppel because he notified Chase of his claim to the assigned rentals prior to consummation of Chase's settlement with Devcon (T-18) and that even if he had attacked the validity of the as-

signment at the time of Chase's seizure of the aircraft, Chase's conduct would not have been altered (T-19).

As to the trustee's assertion that there is no estoppel because he notified Chase of his claim to the assigned rentals prior to consummation of Chase's settlement with Devcon (T-18), it is Chase's position that either such statements were not made or they were never properly communicated except in veiled and purposely vague terms.

And regarding the trustee's further assertion that even if he had attacked the validity of the rental assignments at the time of Chase's seizure of the aircraft, Chase's conduct would not have been altered, it can only be said that such an attack by the trustee would have been totally futile because Chase would have obtained an aircraft admittedly exceeding $40,000 in value, pursuant to the provisions of its duly recorded and then unassigned chattel mortgage and security agreement, and satisfied the remaining rentals due Chase from the proceeds of such sale (¶ 16, A-61; ¶ 10, A-60).

Section 70c of the Bankruptcy Act provides the trustee with three separate powers, all of which invest the trustee, as of the date of bankruptcy, with all the powers the state law would allow to a judgment creditor who had by the date of bankruptcy completed all necessary processes to perfect a lien in the property. 11 U.S.C. § 110(c). *Feldman* v. *First National City Bank,* 368 F.Supp. 1333, 1337-1338 (S.D.N.Y. 1974). The rights of creditors, whether they are existing or hypothetical, to which the trustee succeeds under § 70c are to be ascertained as of "the date of bankruptcy". *Lewis* v. *Manufacturers National Bank,* 364 U.S. 603, 607 (1961), overruling, *Constance* v. *Harrey,* 215 F.2d 571 (2nd Cir. 1954), *cert. denied,* 348 U.S. 913 (1955). Not before or thereafter. Counsel for the trustee has argued in an action against another bank in this very bankruptcy that:

> "... *Section 70(c) is applicable as of the date of the bankruptcy* and the issue of notice is addressed

to the date of bankruptcy. *So that any actions* or any knowledge coming to the trustee or his counsel *subsequent to bankruptcy should not be considered.*" (Italics supplied.) *Feldman* v. *National Bank of North America,* 74 Civ. 175 (E.D.N.Y. June 28, 1974) 11:15 A.M. Transcript of Official Court Reporter, p. 29.*

The date of bankruptcy is the date LCI filed its petition for an arrangement under Chapter XI of the Bankrupcty Act. 11 U.S.C. § 1(13); 11 U.S.C. § 778(a)(2). At the time LCI filed its petition for an arrangement, on August 18, 1970, it is undisputed that Chase had a duly recorded chattel mortgage and security agreement on file with the FAA which would have assured Chase of payment of the remaining rentals due under the Devcon lease, either by reason of the assignment or foreclosure sale of the Cessna (T-3; ¶ 13, A-21). Section 11e of the Bankruptcy Act imposes a two-year period of limitations on actions by a trustee upon claims on behalf of the estate. 11 U.S.C. § 29(e). The purpose of the section was explained by the Supreme Court in *Bailey* v. *Glover,* 88 U.S. 342 (1874), dealing with the predecessor to Section 11(e), namely Section 11(d) of the Bankruptcy Act of 1867:

> "It is obviously one of the purposes of the Bankrupt law, that there should be a speedy disposition of the bankrupt's assets. This is only second in importance to securing equality of distribution. The act is filled with provisions for quick and summary disposal of questions arising in the progress of the case, without regard to usual modes of trial attended by some necessary delay. Appeals in some instances must be taken within ten days; and provisions are made to facilitate sales of property, compromises of doubtful claims, and generally for the early discharge of the bankrupt and the speedy settlement of his estate. It is a wise policy, and if those who admin-

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* Hereinafter, references to such transcript will be made parenthetically as (Transcript p.).

ister the law could be induced to act upon its spirit, would do much to make the statute more acceptable than it is. But instead of this the inferior courts are filled with suits by or against assignees, each of whom as soon as appointed retains an attorney, if property enough comes to his hands to pay one, and then instead of speedy sales, reasonable compromises, and efforts to adjust differences, the estate is wasted in profitless litigation, and the fees of the officers who execute the law.

"To prevent this as much as possible, Congress has said to the assignee, you shall commence no suit two years after the cause of action has accrued to you, nor shall you be harassed by suits when the cause of action has accrued more than two years against you. Within that time the estate ought to be nearly settled up and your functions discharged, and we close the door to all litigation not commenced before it has elapsed." (88 U.S., at pages 346-347)

It is clearly not the intent of the Bankruptcy Act to allow the trustee to wait until an unsuspecting secured creditor has released his perfected rights, in order to sue to set aside such perfected interests solely on the basis of the release; when such release occurred in an attempt by the secured creditor to adjust differences and effect reasonable compromises some two years and five months after the trustee's "cause of action" arose, and there undisputably would have been no basis for an action had the trustee sued when such cause of action accrued or at any time prior to such release. In *Feldman* v. *National Bank of North America, supra,* Honorable Jack B. Weinstein, District Judge, United States District Court, Eastern District of New York, in granting summary judgment for the assignee-bank where such assignee perfected its interest in assigned rentals under the Code rather than the Act and recorded its mortgage in the aircraft as Chase did here, stated from the bench:

"Upon foreclosure, the bank would have been entitled to the plane and is, therefore, entitled to so much of the cash as is owed to it under the chattel mortgage.

"The overly technical construction proposed by the trustee would make reasonable stipulations and reliances by banks and trustees in connection with complex financial transactions so difficult as to preve t reasonable agreements that were and would be to the benefit of both the bankrupt's creditors, who were unsecured, and those who are secured.

"Equity, as well as law, require that the bank's claims should be recognized and that summary judgment in favor of the bank be granted." (Transcript p. 12)

Judge Weinstein also found that, despite the trustee's status under § 70c of the Bankruptcy Act, he had notice of the assignment involved there (Transcript pp. 12, 18, 28-29) and that the trustee was estopped from taking the position that the bank had failed to foreclose on its chattel mortgage, saying:

"I interpret the stipulation and the treatment of this over a period of more than two years as indicating that the trustee acknowledged the validity of the chattel mortgage." (Transcript p. 21).

"I think any other way of reading it would make it impossible for a bank to work with a trustee . . . They would have to continuously enforce every right to the nth degree, and the result would be an enormous loss to all of the financial community." (*Id.* at 23).

"I do think, therefore, that there is a defense of laches here, but that is not the basis for my decision. I would make the finding, that there was laches, since you have asked for it, on the part of the trustee, and that there was extensive reliance here by the bank in the giving up of their right to foreclose over a substantial period.

"I do not want anything that I have said to indicate that I believe that the trustee's position in taking this matter to court was justified or that the trustee is entitled to any fees for this kind of litigation. I leave

> that open for the bankruptcy proceeding, although I note for the record the very extensive litigation, much of which I think was unjustified, as I have already expressed in my opinion." (*Id.* at 27-28).

See also *Feldman* v. *Trans-East Air, Inc., Hudleasco, Inc., and Castle Capital Corporation,* Docket No. 73-2464 (652-September Term 1973 2d Cir. May 7, 1974) 3289, 3294. The trustee sat on his "rights" because he had no basis for a cause of action (A-61, ¶ 16). He is in no better position now because Chase's consent to the assignment occurred some two years and five months after the date as of which the rights of hypothetical creditors conferred upon the trustee are ascertained under § 70c of the Bankruptcy Act (A-43); and the trustee should not now, after collection of proceeds of the sale of the aircraft to Devcon be allowed to assert any infirmity pertaining to Chase's duly recorded chattel mortgage and security agreement (A-21, ¶ 12) or Chase's perfected security interest in the assigned rentals.

CONCLUSION

For the reasons set forth above, the judgment appealed from should be reversed.

Respectfully submitted,

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